IN THE HIGH COURT OF BOMBAY AT GOA
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TAX APPEAL NO. 1 OF 2001

The Commissioner of
Income Tax, Panaji,
Goa. ... Appellant.

Versus

1. M/s. Zuari Finance
Ltd., Hede Centre,
Tonca, Panaji, Goa, and

2. The Income-tax Appellate
Tribunal, Panaji, Bench. ... Respondents.

Shri S. R. Rivonkar and Ms. A. Padte, advocates for the appellant.

Shri V. B. Nadkarni, Senior Advocate with Mr. J. Cardozo, advocate for respondent no.1.

CORAM : P. V. HARDAS &
D. G. KARNIK, JJ.

DATE : 1st April, 2004.

ORAL JUDGMENT (Per D. G. Karnik, J.)

This Appeal at the instance of the Revenue, filed under Section 260-A of the Income Tax Act, 1961 (for short "the Act"), is directed against the Judgment and Order passed by the Income Tax Appellate Tribunal on 2nd May, 2001.

2. The respondent no.1 is a Limited Company engaged, inter alia, in the business of leasing and financing. On 2nd December, 1996, the respondent no.1 (hereinafter referred to as "the assessee"), filed a return of its income declaring income of Rs.3,54,930/-, during the Assessment Year 1996 - 1997 on gross receipts of Rs.67,111,527/-. In the profit and loss account, the assessee has debited a sum of

Rs.17,02,225/- under the head "Depreciation", in respect of a machine called as "Mechanical Skimmer Oil and Grease Removal System" (for short the "skimmer machine"). The assessee had shown this machine as its fixed asset and claimed 100% depreciation on it under Rule 5 of the Income Tax Rules. The assessee had also claimed a sum of Rs.3,95,000/- as a business expenditure on account of foreign travel expenses incurred by its Directors and consultants for the purpose of the business. The return filed by the assessee was processed under Section 143(1)(a) of the Act, but was subsequently taken up for scrutiny after issuance of a notice under Section 143 (2) of the Act. The Assessing Officer asked the assessee to produce the purchase invoice of the skimmer machine in respect of which it had claimed depreciation to the extent of Rs.17,02,225/- under Rule 5 of the Income Tax Rules, 1962. By a reply dated 5th January, 1999, the assessee claimed that it had purchased the machinery from its sister concern M/s. Hede Consultancy Co. Pvt. Ltd.(for short "H.C.C."), on made-to-order basis and had paid to it a sum of Rs.17,02,225/- between 23rd June, 1995 and 8th September, 1995. The details of payment were also furnished. The skimmer machine was thereafter given on lease to Global Environmental Technology Services - a division of H.C.C. and the lease agreement provided for total lease rentals of Rs.19,19,945/-, to be paid in quarterly instalments from February, 1996 to November, 1997. The Assessing Officer doubted the genuineness of the entire transaction and in particular doubted whether the said

machine was really manufactured by H.C.C., and sold to the assessee and taken back on lease by it. In view of this, the Assessing Officer issued notices to the persons from whom the manufacturer had purchased the raw materials and components necessary for manufacturing of the skimmer machine and after recording their statements, concluded that the transactions of manufacture and sale of the machine by H.C.C.to the assessee and its lease back, were not genuine and, therefore, the assessee was not entitled to claim depreciation of Rs.17,02,250/-, as claimed by it. As regards the claim for deduction of travelling expenses the Assessing Officer held that the foreign travel expenses appeared to be personal trips of Directors and the wife of the Vice Chairman. He also held that Mrs. S. P. Hede, wife of Mr. P. R. Hede – the Vice Chairman of the assessee, had merely accompanied her husband during the foreign trips, without there being any business purpose. He, therefore, held that the foreign travel expenses were not incurred wholly and exclusively for the purpose of business and, therefore, disallowed the foreign travel expenditure to the extent of Rs.3,95,000/-. Since the assessee had tried to evade payment of taxes, proceedings under Section 271 (1) (c) of the Act were initiated separately.

3. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Belgaum. The Commissioner of Income Tax (Appeals) held that the Assessing

Officer had proved to the hilt the bogus nature of the transaction of purchase of the skimmer machine and its lease. He also held that the assessee company had not proved that the trips undertaken by the Chairman, Vice-Chairman and the Directors were incurred for the business of the assessee, because nothing tangible came out of the said foreign trips. He further held that the travel expenses of Mrs. Hede, wife of the Vice-Chairman Shri P. R. Hede, were in no way related to the business of the appellant and, therefore, could not have been allowed as deduction. The appeal was accordingly dismissed by Order dated 3rd October, 2000.

4. The assessee carried the matter before the Income Tax Appellate Tribunal (for short the Tribunal). The Tribunal held that the assessee had proved beyond doubt that it had got fabricated the skimmer machine and that the same had been given under lease to H.C.C.. It also held that the lease transaction was genuine. As regards the foreign travel expenses of Rs.3,95,000/-, the Tribunal held that it cannot be said that the foreign travel was not wholly and exclusively for the business of the assessee and the mere fact that the foreign travel did not fructify in any business was not a ground for disallowing the foreign travel expenditure. In view of this finding on both the issues, by the impugned Order dated 2nd May, 2001, the Tribunal allowed the appeal.

5. By an Order dated 7th January, 2002, a Division

Bench of this Court admitted the appeal on the questions formulated in paragraph nos. 5 A, B, D and F of the appeal memo, which read as under:-

> (A) Whether the concurrent findings of facts based on the sufficient evidence arrived at by the Assessing Officer and the First Appellant (Appellate) Authority, that the whole transaction leading to the acquisition of Skimmer Machine was not genuine, could be reversed by the Second Appellate Authority (ITAT) by allowing the Party to adduce further evidence, particularly when ample opportunity was given to the Assessee to prove its case before the lower Authorities?
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> (B) Whether the assessee is entitled to claim depreciation under Rule 5 of the I.T. Rules, on failure to prove the existence or possession of the skimmer machine?
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> (D) Whether on the facts and circumstances of the case the ITAT was justified in law in setting aside the assessment, merely on the basis of book entries made by the assessee, particularly where the assessee had failed to prove the genuineness of the fabrication and use of the skimmer machine for its business purpose? and
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> (F) Whether the expenses incurred by the assessee for the purpose of Foreign travel by its Chairman, consultants and Directors could be termed as business expenditure under Section 37 of the I.T. Act, read with Rule 6D of the I.T. Rules or capital expenditure?"

The rest of the questions raised in the Appeal Memo were not considered as substantial questions of law.

6. The appeal has been filed in this Court under Section 260-A of the Act which reads as under:-

"Appeal to High Court.

260-A (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner;

(b) (omitted)

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

Section 260-A of the Act was introduced into the Act by the Finance Act no.2 of 1998 w.e.f. 1st October, 1998. The appeal relates to the Assessment Year 1996-1997 and the initial proceedings under Section 143(2) of the Act appear to have been initiated prior to the introduction of Section 260-A. As the learned counsel for the respondents has not urged the question of maintainability to the appeal under Section 260-A of the Act in respect of the assessment proceedings commenced or initiated before 1st October, 1998, we have heard the appeal on merits. Under Sub-section (1) of Section 260-A of the Act an appeal lies to the High Court only on a substantial question of law. Sub-section (3) of Section 260-A requires the High Court to formulate the question/s of law involved. Under Sub-section (4), the appeal can be heard only on the questions of law formulated under Sub-section (3) and on no other questions. Since the question/s of law is/are ordinarily framed at the stage of admission, which is often made without notice to the respondent, the respondent is allowed to contend, at the hearing of the appeal, that the appeal does not involve a substantial question of law. Under the proviso to Sub-section (4), the High Court is empowered to hear, for reasons to be recorded, the appeal on any other

substantial question of law not earlier formulated under Sub-section (3), if it is satisfied that the case involves such a question. In the present case, learned counsel for the appellant did not urge before us that the appeal involves any substantial questions of law other than those formulated under paragraphs 5 A, B, D and F. The learned counsel for the respondent no.1 however urged that the questions framed do not involve any question of law. He submitted that the questions 5 A, B and D are pure questions of fact and do not involve a question of law, much less a substantial question of law. He, therefore, urged that the appeal be dismissed on the ground that it does not involve any substantial question of law. We proceed to consider the submission below.

7. An assessee, aggrieved by an order passed by the Commissioner (Appeals), is entitled to file an appeal before the Tribunal under Section 253 of the Act, both on questions of fact as well as law. A decision of the Tribunal on questions of fact is final and no appeal is provided to the High Court on questions of fact decided by the Tribunal. Under Section 260-A an appeal lies to the High Court only if the case involves substantial questions of law. The learned counsel for the appellant urged that the Tribunal erred in reversing concurrent findings on facts reached by the Assessing Officer and the Commissioner (Appeals) that the transaction of purchase of the skimmer machine and its lease was bogus. Interfering in the concurrent findings of fact

was erroneous and, therefore, submits learned counsel, substantial question of law is involved. We are unable to agree. Since no restrictions are placed on the appellate power of the Tribunal, in our opinion, the Appellate Tribunal is entitled to re-appreciate the evidence adduced before the Assessing Officer and/or the Commissioner (Appeals) and is entitled to reach its own conclusions on all questions of fact. It is not bound by the findings of fact recorded by the Assessing Officer and the Commissioner (Appeals). In the present case, we notice that the Appellate Tribunal has carefully considered and marshalled the evidence which was adduced before the Assessing Officer and the Commissioner (Appeals). The Appellate Tribunal has also carefully considered the evidence of the witnesses to whom summonses were issued by the Assessing Officer. On re-appreciation of the evidence, which it was entitled to do, the Tribunal came to the conclusion that the assessee had acquired the skimmer machine and was owner of it at the relevant time. The Tribunal further considered the fact that the lease rentals which were paid by the lessee not in accordance with the original terms as stipulated in the lease agreement, would not by itself prove that the assessee had not given the machinery on lease at all. The Tribunal has noted that it was open to the parties to accept lease rentals on dates different than those provided in the original lease agreement. A perusal of the order of the Tribunal shows that it has considered all the relevant evidence and given cogent reasons for its conclusion.

The mere fact that the Appellate Tribunal has reversed the concurrent findings of the Assessing Officer and Commissioner (Appeals) is no ground for holding that the findings of fact reached by the Appellate Tribunal are perverse. The findings of fact reached by the Tribunal are possible findings, and merely because they are of reversal is no ground for interference under Section 260-A of the Act. In our opinion, the question whether the transaction of acquisition of the skimmer machine was bogus as held by the Assessing Officer and the Commissioner (Appeals), or a genuine transaction is a pure question of fact. The finding reached by the Tribunal that the transactions of acquisition of the skimmer machine and its lease were genuine transactions are pure questions of fact and they do not involve any question of law, much less a substantial question of law. The findings of the Tribunal are based on appreciation of evidence and cannot be interfered in appeal under Section 260-A of the Act. In any event, we find no error of law, nor any error in re-appreciation of evidence by the Tribunal. The questions nos.5 A and D are, therefore, answered in the negative and the question no. 5 B, in the affirmative, i.e. against the Revenue.

8. On the question of disallowance of foreign travel expenses of Rs.3,95,000/-, it is admitted that the expenses included expenses of travel not only of the Directors of the assessee company, but also expenses for travel of Mrs. S. P. Hede, wife of the Vice Chairman of the assessee. By a letter dated 8th February, 1999, the assessee Company was

called upon to explain and furnish evidence as to how the foreign travel expenses were incurred wholly and exclusively for the business of the Company. The assessee did not file any explanation or evidence in response to the said letter. As no evidence was adduced before the Assessing Officer, the Assessing Officer, rejected the claim for foreign travel expenses and the finding was confirmed by the Commissioner (Appeals). The Appellate Tribunal has set aside the well-reasoned findings of the Assessing Officer and the Commissioner (Appeals). In paragraph no. 42, the Tribunal has observed that the mere fact that no tangible business came out of the foreign visits is not a ground for disallowing the foreign travel expenditure, because it is possible that in the first meeting only business discussions would take place and nothing tangible may come out. So far, the reasoning is correct. However, a specific contention was raised before the Tribunal that the foreign travel expenditure on travel of Mrs. S. P. Hede, the wife of the Vice Chairman, was not for the purpose of business, as she was neither a Director, nor concerned with the Company. The Tribunal has not recorded any finding of fact whether Mrs. S. P. Hede was required to travel for the business of the Company. In fact, the Tribunal has not considered any evidence for allowing the foreign travel expenditure specially of Mrs. S. P. Hede, the wife of the Vice Chairman of the assessee. The finding is thus not based on appreciation of evidence and the well-reasoned findings of the Assessing Officer and the Commissioner

(Appeals) are set aside without any discussion and on no evidence. As the Tribunal is the final court of facts, the matter is required to be remanded to the Tribunal for recording a finding with reasons, on question no.5 F, i.e. on the question of foreign travel expenses, specially that of Mrs. S. P. Hede, the wife of the Vice Chairman of the assessee.

9. For these reasons, the Appeal is partly allowed and the matter is remanded to the Tribunal for the purpose aforesaid. In the facts and circumstances of the case, there shall be no order as to costs.

P. V. HARDAS, J.

D. G. KARNIK, J.

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